CE COPY

Office-Supreme Court, U.
FILED
SEP 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 302

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

WELLINGTON MILLS DIVISION,
WEST POINT MANUFACTURING COMPANY,
Respondent.

OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANK A. CONSTANGY,
Attorney for Respondent
1611 Candler Building
Atlanta, Georgia 30303

Of Counsel,
CONSTANGY & PROWELL
1611 Candler Building
Atlanta, Georgia 30303

INDEX

Page

I. QUESTION NO. 1 OF THE PETITION FOR WRIT OF CERTIORARI IS IMPROPERLY STATED 1

II. REASONS FOR DENYING THE WRIT AS TO QUESTION NO. 1 3

A. The Court of Appeals for the Fourth Circuit Does Not Have An "Inflexible Rule" As Alleged in the Petition 3

B. The Court of Appeals Has Followed Directives of this Court Set Out in *Universal Camera v. NLRB* 5

C. The Decision of the Court Below In Denying Enforcement of the Board's Order As to Allen Shows that the Court Made Its Finding After A Careful and Exhaustive Examination of the Record Considered as A Whole Which Convinced the Court that Substantial Evidence Did Not Support the Board's Order 16

D. The Petition for Writ Seeks to Have this Court Review A Decision by the Fourth Circuit Court of Appeals Which Turns Solely on the Substantiality of the Evidence as Shown by Particular Facts and Evidence in the Record of this Case 19

III. REASONS FOR DENYING THE WRIT AS TO QUESTION NO. 2 21

INDEX — (Continued)

Page

A. The Court of Appeals' Decision that the Activity of the Personnel Director of the Company in Collecting names of Persons Who Would be Interested in Attending a Meeting of the "Citizens Club" Was Not Illegal Interference or Interrogation Makes It Unnecessary to Review the Court's Subsidiary Finding that in Engaging in this Activity He Was Not Acting As An Agent Or Instrument of the Company 21

IV. CONCLUSION 24

TABLE OF CASES AND CITATIONS

	Page
Eastern Coa. Corp. v. NLRB, 176 F. 2d 131	8
Martel Mills Corp. v. NLRB, 114 F. 2d 624	3, 8
NLRB v. American National Insurance Co., 344 U. S. 395	20
NLRB v. A. S. Abell Company, 327 F. 2d 1	13, 14
NLRB v. Baltimore Paint and Chemical Co., 308 F. 2d 75	11
NLRB v. Brookside Industries, Inc., 308 F. 2d 224	10, 23
NLRB v. Empire Mfg. Corp., 260 F. 2d 528	10, 12
NLRB v. Globe Products Corp., 322 F. 2d 694	11
NLRB v. Jones Sausage Co., 257 F. 2d 878	12
NLRB v. Lester Brothers, Inc., 301 F. 2d 62	4, 11
NLRB v. Marval Poultry Co., Inc., 292 F. 2d 454	12
NLRB v. Moss Planing Mill Co., 206 F. 2d 557	12
NLRB v. Overnight Transportation Co., 308 F. 2d 279	12
NLRB v. Overnight Transportation Co., 308 F. 2d 284	12
NLRB v. Pugh & Barr, Inc., 231 F. 2d 558	4
NLRB v. School-Timer Frocks, Inc., 224 F. 2d 336	4
NLRB v. Threads, Inc., 308 F. 2d 1	4, 9, 10, 11, 12
NLRB v. United Brass Works, Inc., 287 F. 2d 689	4, 9, 10, 11, 12

TABLE OF CASES AND CITATIONS — (Continued)

Page

NLRB v. Walton Manufacturing Co., 369 U. S. 404 ..... 5, 15

Northern Virginia Steel Corp. v. NLRB, 300 F. 2d 168 12

S. S. Monrosa v. Carbon Black Export, 359 U. S. 180 21

United States v. Johnson, 268 U. S. 220 ..... 19, 23

Universal Camera Corp. v. NLRB, 340 U. S. 474 ..... 2, 3, 4, 5, 6, 7, 8

STATUTES

Administrative Procedure Act, as Amended (60 Stat. 237, 5 USC Sec. 1001, *et seq.*)
Section 10 (e) 5

National Labor Relations Act, as Amended (61 Stat. 136, 29 USC Sec. 151; *et seq.*)
Section 8 (a)(1) 15, 17, 22
Section 8 (a)(3) 2, 15, 16, 18
Section 10 (e) 5, 13

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 302

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

WELLINGTON MILLS DIVISION,
WEST POINT MANUFACTURING COMPANY,
Respondent.

OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

1. QUESTION NO. 1 OF THE PETITION FOR WRIT OF CERTIORARI IS IMPROPERLY STATED

Contrary to the statement in Question No. 1, which appears on Page 2 of the Petition, the Court of Appeals for the Fourth Circuit does not have a rule "that in reviewing findings of the Labor Board an employer's discharge of an employee, although allegedly for cause, was in fact because of the employee's union activities . . . that such finding will be reversed whenever the employee has been guilty of prior misconduct similar to that for which he was assertedly discharged."

The Court below found in denying enforcement of the Board's Order that Milford Allen's discharge was violative of Section 8(a)(3) of the National Labor Relations Act, the issue upon which certiorari is sought in Point 1 of the Petition:

> "Viewed, 'in the light that the record in its entirety furnishes' we 'cannot conscientiously find that the evidence supporting (the Board's) decision substantial' (citing Universal Camera v. NLRB, 340 U.S. 474, 71 Sup. Ct. 456, 465)."
> *(Pet. p. 31)*

In its Opinion, the Court set out in detail the evidentiary basis for its rejection of enforcement of the Board's Order as to Allen (Pet. pp. 28-32).

The actual question presented by the Petition for Certiorari is indeed a simple one, viz., do the decisions of the Court of Appeals for the Fourth Circuit demonstrate that in cases seeking enforcement of Labor Relations Board Orders it has adopted "an inflexible rule" that it will not enforce the Board's finding of an illegal discharge of an employee for dereliction of his duties or infraction of rules when the employee has been warned or disciplined for such offense and thereafter repeats the same offense.[1]

---

[1]Incongruously, the Petition disclaims the application of any rule applied by the Court below in its denial of enforcement of the Board's Order based on findings that employees Evans and McKinney were discharged for discriminatory reasons, but instead baldly asserts that the Court of Appeals for the Fourth Circuit misapplied the standard established by this Court in *NLRB v. Universal Camera* with respect to these discharges. This assertion tacitly concedes there is nothing upon which to base a claim of misapprehension or gross misapplication" of the standards of judicial review set out in the Act or in the

II. REASONS FOR DENYING THE WRIT AS TO QUESTION NO. 1

A. The Court of Appeals for the Fourth Circuit Does Not Have An "Inflexible Rule" As Alleged in the Petition

The Court of Appeals for the Fourth Circuit has not established a special "pattern" or "inflexible rule" as alleged by the Petitioner for this, or any other, type of Labor Board case. On the contrary, the Decisions of the Court of Appeals for the Fourth Circuit demonstrate that it has consistently performed the duty prescribed by the Decisions of this Court and the applicable statutes in reviewing National Labor Relations Board decisions. Any reading of the Decision of the Court of Appeals clearly demonstrates that it, in considering any Petition for Enforcement of a Labor Board Order, as it did in the instant case, thoroughly examines the entire Record; and, based upon that Record, reaches its conclusion as to whether the Board's Order is supported by substantial evidence in the Record considered as a whole.

The Petition asserts that the Court of Appeals has here applied an "inflexible rule", which it alleges the Court has "fashioned . . . in three earlier decisions", to displace the Board's choice between two fairly conflicting views on an issue of fact in violation of *Universal Camera* (Pet. p. 11). It then adverts three prior cases of the many Labor Board cases decided by the Court below; *Martel Mills Corp. v. NLRB*, 114 F. 2d

---

Universal Camera case by the Court of Appeals, and indeed is a request that this Court become merely a reviewing forum in regard to the facts as to these two discharges.

624, (4th Cir.); decided in 1940, before the enactment of the 1947 Amendment to the Act, and before this Court's Decision in *Universal Camera; NLRB v. United Brass Works, Inc.*, 287 F. 2d 689 (4th Cir.), decided in 1961; and *NLRB v. Threads, Inc.*, 308 F. 2d 1 (4th Cir.), decided in 1962; and contends that these Decisions constitute a "rigid rule" of the Fourth Circuit to apply what is labeled a "special test for passing on substantiality of evidence" in the Fourt Circuit (Pet. p. 14).

An analysis of a long line of decisions in Labor Board cases by the Court of Appeals for the Fourth Circuit shows no inflexible rule as asserted in the Petition has in fact been adopted. On the contrary, as we will demonstrate, the Decision in each case by that Court is made on the facts in the particular Record therein considered as a whole and in strict conformity with the duty imposed upon the Courts of Appeals as announced by this Court in *Universal Camera*.

It is significant, we submit, that the Dissenting Judge in the instant matter did not view the majority decision in his case as being based upon the application of the alleged "inflexible" rule. The Dissenting Judge made no reference to an "inflexible rule" but asserted that he believed the Decision of the Majority of the Court in this case was a "departure" from certain other Decisions of the Court, such as *NLRB v. Lester Brothers, Inc.*, 301 F. 2d 62 (4th Cir., 1962); *NLRB v. Pugh & Barr, Inc.*, 231 F. 2d 558 (4th Cir. 1956); *NLRB v. School-Timer Frocks, Inc.*, 224 F. 2d 336 (4th Cir., 1955) (Pet. p. 42).

In the *Universal Camera* case, this Court made clear the kind of scrutiny the Court of Appeals was required

to give to the Record when, as in this case, it is called upon to decide whether the Board's Order is supported by substantial evidence considered as a whole:

> "Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes including the body of evidence opposed to the Board's view."
>
> *Universal Camera Corp. v. NLRB, 340 U. S. at p. 488*

As noted in this Court's Opinion in *Universal Camera*, the Act requires that a Court of Appeals, when reviewing a Decision of the National Labor Relations Board on a Petition for Enforcement, must overrule the Board if it cannot conscientiously find that substantial evidence in the Record considered as a whole supports the Board's conclusions. The Administrative Procedure Act (5 USCA Sec. 1009 (e)) and the Labor Management Relations Act of 1947 (29 USCA Sec. 160 (e)) both so provide.

B. The Court of Appeals Has Followed Directives of this Court Set Out in Universal Camera v. NLRB

The Petition asserts (p. 15) that "If the Board, in light of all the circumstances, could reasonably find, as it did here, that the employee's union activity, and not his misconduct, prompted the Employer's action, the proper application of the standard announced in *Universal Camera* and *Walton* requires that such a

finding be sustained." This contention if sustained would result in a direction to the Court of Appeals to abdicate its responsibility under the statute and return again to a pro forma adoption of findings of the National Labor Relations Board if supported by any evidence without regard to the evidence in the Record considered as a whole. This very practice by some Courts of Appeals, including the Fourth Circuit, prompted the passage of the Administrative Procedures Act in 1946 and the equivalent provisions for judicial review in the Labor-Management Relations Act of 1947. The contention was, in fact, rejected by this Court in the *Universal Camera* case, to-wit:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedures Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."
>
> *(340 U. S. at p. 487)*

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes

such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. . ."

(340 U. S. at pp. 487-488)

* * *

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the *reasonableness and fairness* of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board *keeps within reasonable grounds*. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeal. . . " (Emphasis supplied)

(340 U. S. at p. 470)

The *Universal Camera* case was itself brought to this Court because the views of the Second Circuit conflicted with those of the Sixth Circuit concerning the effect of new legislation on the enforcement of Labor Board orders. This Court noted in Footnote 1 of that Decision that the Courts of Appeals of five cir-

cuits in agreement with the Court of Appeals for the Second Circuit were of the opinion that no material change was made in the function or power of Courts of Appeal in reviewing Labor Board Orders by the statutes referred to above. One of those courts which had erroneously concluded that no change was made in the reviewing power was the Fourth Circuit. *Eastern Coal Corp. v. National Labor Relations Board*, 176 F. 2d 131, 134-136 (4th Cir., 1949).

In the Petition for Writ, it is now argued that the Court of Appeals for the Fourth Circuit has "misapprehended" or "grossly misapplied" the teachings in *Universal Camera* by making a rule allegedly based on its holding in *Martel Mills Corp. v. National Labor Relations Board*, 114 F. 2d 624. The *Martel* case was decided in 1940 long before *Universal Camera*. The premise that the Court of Appeals was too strict in 1940 is in the light of *Eastern Coal Corp.* invalid. This Court has, since the Fourth Circuit's *Martel Mills* decision, at least indirectly admonished the Fourth Circuit *not to abdicate its judicial function and to in fact assume more responsibility for the "reasonableness and fairness" of Labor Board decisions.*

The Petition for Writ asserts the controlling test ought not to be whether legal cause for discharge existed, but whether union animus in fact motivated the discharge. The Court of Appeals said nothing different in the *Martel Mills* case:

> "We do not lose sight of the fact that our inquiry is centered upon the motivating cause of the employer's action. The task is a difficult one. It involves an inquiry into the state of

> mind of the employer. Such inquiry is laden with uncertainties and false paths. Obviously our chief guide is the words of the witness under oath who undertook to disclose the workings of his mind. If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation. See National Labor Relations Board v. Remington Rand, Inc., supra, 94 F. 2d at page 862. We are not convinced that the Board has offered sufficient evidence to meet its burden of proof. Isolated statements which alone carry incriminating import often lose their ominous significance when surrounded by all the facts of a given case. We do not find substantial evidence to support any illegal motive such as is proscribed by Section 8(3) of the Act."
>
> *114 F. 2d 624, at p. 631*

As the Court of Appeals made clear in the *Martel Mills* case, the ultimate question is: has the Board met the burden of proof imposed upon it by law that its findings be supported by substantiial evidence in the Record considered as a whole. It is not a matter of the Court of Appeals' substituting its judgment for that of the Board, but rather of the Court examining the Record to see if the Board's findings have the required evidentiary support to be entitled to be enforced by the Court.

The Petition relies on the Decisions of the Court below in *United Brass, Threads, Inc.*, and in the instant case to support its assertion that the Court below has adopted an inflexible rule in Labor Board cases which

is inconsistent with the teachings of this Court in *Universal Camera*. The Board did not cite or discuss any of the following decisions of the Court of Appeals for the Fourth Circuit, in each of which the Court declined to overrule the findings of the Board. On the contrary, it upheld the Board because the Court could in good conscience see in the Record considered as a whole, substantial evidence supporting the Board's conclusion. Among the earliest of the cases decided by the Fourth Circuit after *Universal Camera* was *NLRB v. Empire Mfg. Corp.*, 260 F. 2d 528 (1958). There the Court declined to upset the Board's finding that the discharge of an employee was for union activity even though the employee was discharged for allegedly talking to fellow employees and thereby interfering with their work, to the extent that another employee complained to the supervisor about the disruption of her work. The discharged employee had been previously guilty of the same offense and had been warned about it.

In *NLRB v. Brookside Industries, Inc.*, 308 F. 2d 224 (1962), one of the alleged discriminatee (Mary Strader) was discharged for excessive conversing during work time. (The reason for discharge stated in the Record was insubordination as a result of the violation of a standing order against undue conversation.) The Court of Appeals found that the Record was adequate to support the Board's finding that the discharge was in fact prompted by her union activities. The finding was that "Positive evidence was adduced of her over talking and of warnings to her. . . We cannot say, however, the Board was not warranted in its conclusion." ((pp.226-227). This case was decided subsequently to both *United Brass* and *Threads, Inc.*

In *NLRB v. Baltimore Paint and Chemical Co.*, 308 F. 2d 75 (1962), also decided after both *United Brass* and *Threads, Inc.*, the Court below upheld the Board's finding that an employee, Knott, was discharged for union activity. The Court enforced the Board's order in spite of undenied testimony offered by the company which demonstrated that Knott had left his job, even though he was not assigned to a "rush job" on that day, and on two prior occasions Knott had been caught smoking in the bathroom contrary to plant rules and had been late to work on the day of his discharge. At pages 76-77 the Court of Appeals agreed with the Board that the prior offenses, even though similar to the one for which he was discharged, were not the real reason for the discharge, and enforced the Order.

In *NLRB v. Lester Brothers, Inc.*, 301 F. 2d 62, (1962), the Court below agreed with the Board that substantial evidence supported its Order reinstating a "discharged employee" (Craig), who the Company asserted had been laid off in a "reduction in force" even though Craig had been guilty of prior misconduct for which he was reprimanded and could have justified his discharge. The Employer's many "reasonable" explanations were rejected by the Trial Examiner and the Board; and the Court of Appeals, upon review of the evidence in the Record as a whole, agreed and enforced the Board Order.

In an even more recent decision the Court below agreed with the Board when it held that an employee was discharged for union activities rather than for poor production *(NLRB v. Globe Products Corp.*, 322 F. 2d 694, (1963). There the employee in question (Ruth Moran) was discharged, according to the Company,

for poor production. There was no specific denial that the Plant Manager had told Moran two weeks prior to her discharge that her production was poor and that unless it improved, she would have to be released. Within two weeks of this warning, Moran was discharged for poor production.

The Board did not lack for authority in arguing its position before the Court of Appeals when it sought enforcement of its Order in this case. In its Brief to the Court of Appeals in the instant matter, the Board stated:

> "This Court has repeatedly affirmed that 'the circumstances of each case must be weighed to determine what motivations truly dominated the employer in . . . discharging employees'. *NLRB v. Jones Sausage Co.*, 257 F. 2d 878, 882 (CA 4);
> *NLRB v. Overnight Transportation Co.*, 308 F. 2d 279, 281 (CA 4);
> *NLRB v. Overnight Transportation Co.*, 308 F. 2d 284, 288 (CA 4)."

The Board also cited Fourth Circuit decisions in *NLRB v. Moss Planing Mill Co.*, 206 F. 2d 557 (CA 4); *NLRB v. Marval Poultry Co., Inc.*, 292 F. 2d 454 (CA 4); *Northern Virginia Steel Corporation v. NLRB*, 300 F. 2d 168 (CA 4); and *NLRB v. Empire Mfg. Corp.*, 260 F. 2d 528 (CA 4).

Neither the *Threads, Inc.*, case, the *United Brass* case, nor the instant case bears out the charge of inflexibility. In both the *United Brass* and the *Threads, Inc.*, cases, as here, the Court found the Board had

ignored or failed to give weight to undisputed facts in the Record which established that the offense resulting in the discharge was a repetition of a like offense by the dischargee. The Court determined on the basis of the evidence that the Board's inference that the reason for the discharge was not the misconduct of the employee, but that the admitted misconduct was merely a "pretext" for the discharge, did not have substantial support in the evidence.[2]

A full statement of the Court of Appeals' concept of its function and duty in review of Labor Board Decisions is set out in its recent Decision in *NLRB v. A. S. Abell Company*, 327 F. 2d 1, at pages 5 and 6, where Judge Boreman, who wrote the Majority Opinion in the instant matter, speaking for a unanimous Court, said:

> "Before proceeding to a consideration of the circumstances present here . . . the proper scope of this court's review of a Labor Board decision should be emphasized. Under Section 10 of the Administrative Procedure Act and Section 10 (e) of the amended National Labor Relations Act, this court's function when reviewing a decision of the National Labor Relations Board is limited to determining whether there is substantial evidence on the record considered as a whole to support the Board's determination. Thus, this court may not sub-

---

[2]". . .No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged. . . if such individual was suspended or discharged for cause. . ."

29 USCA Sec. 160 (c)

stitute its judgment for that of the Board in a case where the evidence admits of two fairly conflicting conclusions even if it would have decided the issue differently had the matter been before it *de novo*. . . This is not to say, however, that our inquiry should go no further than to ascertain whether there is evidence in the record which, in and of itself, tends to support the Board's conclusion. Rather we are obliged to scrutinize the whole record, taking into account whatever fairly detracts from the evidence relied upon by the Board. Performance of this duty was forcefully enjoined upon the Court of Appeals by the United States Supreme Court in Universal Camera Corp. v. Labor Bd. . .

In NLRB v. Threads, Incorporated, 308 F. 2d 1 (4th Cir. 1962), this court noted and applied the principles enunciated in Universal Camera as a guide in reviewing Board decisions.

Upon consideration of the whole record, and mindful of the respect which should be accorded Board decisions, we do not believe that the evidence tending to support the conclusion that the carriers here involved are employees of the publishers is substantial. . ."

NLRB v. A. S. Abell Company, 327 F. 2d 1, at pages 5 and 6, 4th Cir. (1964)

We submit that the Decisions of the Court of Appeals for the Fourth Circuit have been consistent with the rules and the guidance of this Court in *Universal*

Camera and with the obligations of the Courts of Appeals under the applicable statutes. The Court of Appeals for the Fourth Circuit has neither "misapprehended" nor "grossly misapplied" these rules. Nor has the Court of Appeals for the Fourth Circuit committed the same error which the Board says was committed by the Court of Appeals for the Fifth Circuit in *NLRB v. Walton Manufacturing Co.*, 369 U. S. 404:

In the *Walton* case the Court of Appeals for the Fifth Circuit was charged with requiring a different standard of proof to grant enforcement of Board Orders which asserted violations of Section 8(a)(3) of the National Labor Relations Act than it required for proof of violation of Section 8(a)(1). This Court, in deciding that case, stated that "there is no place in the statutory scheme for one test of the substantiality of evidence in cases and another test in other cases." This Court clearly stated, moreover, that the reviewing function is not deposited in the United States Supreme Court, but in the Court of Appeals, and remanded the case to the Court of Appeals for its reconsideration. *NLRB v. Walton Manufacturing Co.*, 369 U. S. 404, at p. 408.

Following this Court's decision in *Walton*, the Fourth Circuit Court of Appeals decided *NLRB v. Threads, Inc.*, one of the cases cited in the Petition for a Writ as illustrative of the asserted "inflexible" rule of the Fourth Circuit. There, the Court of Appeals once again reviewed *Universal Camera* (at Page 5) and reviewed *Walton*, as well (at Page 6).

After reviewing both cases, this Court of Appeals stated, in complete consistency with the mandates of this Court:

> "We believe, however, that we are warranted in following the principles announced in Universal Camera as a guide in reviewing such cases as the one before us. We have examined and considered the whole record, not only all evidence which in and of itself would justify the Board's decision but also contradictory evidence or evidence from which conflicting inferences would be drawn."
>
> *NLRB v. Threads, Inc., 308 F. 2d 1, at p. 7 (1962)*

C. The Decision of the Court Below In Denying Enforcement of the Board's Order As To Allen Shows that the Court Made Its Finding After a Careful and Exhaustive Examination of the Record Considered As A Whole Which Convinced the Court that Substantial Evidence Did Not Support the Board's Order.

The Court of Appeals, upon careful review of the evidence, found that substantial evidence in the Record considered as a whole did not support the Board's finding that an employee (Milford Allen) was discriminatorily discharged in violation of Section 8 (a)(3) of the National Labor Relations Act. The Board, in spite of the largely undisputed evidence (much of which was admitted by Allen himself) as to valid and non-discriminatory reason for the discharge, had based its finding on its inference that the basis of discharge asserted by the Employer was a "pretext". This inference was in turn based upon the Board's

findings that the Company, in pursuit of anti-union policies, had committed eight or nine separate acts in violation of Section 8 (a)(1) of the National Labor Relations Act. The Court of Appeals found only that one of these acts violated Section 8 (a)(1). The Petition here questions the finding of the Court of Appeals in connection with only one of the rejected findings (Pet. Fn. 4, P. 3, 4).

What remains of the Board's basis for its inference is thus two isolated and unconnected items of violation of Section 8 (a)(1) of the Act (assuming, arguendo, that the incident referred to in Question 2 of the Petition is a violation of Section 8(a)(1)). The Petition seeks to reverse the Court below's finding that the one isolated incident of violation of 8(a)(1) was not substantial enough in the light of the contrary evidence to support the Board's finding that the reason assigned for Allen's discharge was a "pretext", when viewed in context of the largely undisputed evidence as to Allen's misconduct which appears in the Record.

It is clear, we submit, from any reading of the Opinion below that the Court of Appeals made an exhaustive examination of the evidence in the Record, looking at all the evidence, and reached its conclusion, based upon that examination, that the Board's infer-

ence and finding that the incidents and derelictions for which Allen was discharged were a "pretext" and that the discharge violated Section 8(a) (3) of the Act, lacked the support of substantial evidence in the Record.[3]

The court concluded:

> "Viewed 'in the light that the Record in its entirety furnishes', we 'cannot conscientiously find that the evidence supporting the Board's decision is substantial.' . . ."
>
> *(Pet., p. 31)*

---

[3]The Court below in its Opinion found:

"At the time of the second alleged dereliction and the ensuing discharge, Allen's union adherence and activity were actually known to the Company. From conflicting evidence the Board, by uniformly crediting the testimony of Allen where it conflicted with that of both Williamson and Snipes, found that certain equivocal remarks, made both by Williamson at the time he told Allen to leave and by Snipes at the time he discharged Allen, indicated that the discharge was preconceived and was motivated by Allen's union adherence rather than by gross and wilful inattention to his job assignment. The Board concluded, from the Company's knowledge of Allen's union activity, the Company's demonstrated opposition and hostility to the Union and the remarks made by the supervisors, that the asserted dereliction of Allen was used by the Company as a mere 'pretext' for discharging him and that the real reason for the discharge was Allen's union activity. . . *(Pet., p. 29)*

"In view of some of the hereinafter mentioned circumstances shown by the record in the instant case, we might add that neither will repeated and pointed statements or actions by the employee, designed to bring his union adherence forcefully to the attention of his employer, shield the employee from discharge for good cause when such is reasonably shown to exist. . . *(Pet., p. 30)*

"The Board in effect found that the Company's explanation tending to show that Allen's discharge was for cause and

D. The Petition for Writ Seeks to Have this Court Review a Decision by the Fourth Circuit Court of Appeals Which Turns Solely on the Substantiality of the Evidence as Shown by Particular Facts and Evidence in the Record of this Case.

This Court has said, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U. S. 220, 227.

This is not a case which merits the review of the Supreme Court of the United States. As the Court itself has said in *Universal Camera:*

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole, there is substantial evidence to support agency findings is a question which Congress has placed in keeping of the Courts of Appeals. . ."
>
> *340 U. S. 474, at pp. 490-491.*

---

not for union membership and activity was not reasonable. . . *(Pet., p. 31)*

"The Board emphasizes that Allen had been a satisfactory employee over the previous term of his employment and had not until August 22, 1961, received any formal reprimands or been the subject of any adverse performance reports. However, these circumstances do not, in this particular case, lend compelling support to the finding that the Company was motivated purely by union antipathy. In view of the fact that both incidents occurred subsequent to Allen's recently undertaken union activities, the first of which occurred prior to the time that the Company became aware of such activities, the picture portrayed is that of an employee, previously exhibiting at least average loyalty to his job and satisfactory performance, who becomes so engrossed in union and anti-management activities that he neglects his job responsibilities. It is clear that an employer has the right to discharge any employee under such circumstances, whether he be active in union organizations or not. . ." *(Pet., pp. 31-32)*

The Court subsequently has had occasion to reiterate this principle:

> "Last term we made it plain that Congress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, although fair-minded judges could find it tilting either way.' National Labor Relations Board v. Pittsburgh S. S. Co., 340 U. S. 498, 503 (1951). We repeat and reaffirm this rule. . ."
>
> *NLRB v. American National Insurance Co.*
> *343 U. S. 395, at pp. 409-410*

In essence, it appears that the Board is asking the Court to assume a reviewing function in connection with the Court's ruling in the single discharge made the basis of the Petition for a Writ here.[4] This Court has repeatedly declined to exercise such function.

---

[4]Although Petitioner asserts without basis other than its apparent dissatisfaction with the end conclusion reached by the Court below that it "misapplied the Universal Camera standard in setting aside the findings respecting employees McKinney and Evens" (Pet., p. 2), it asserts only that "in the case of these two discharges there was substantial evidence to support the Trial Examiner's conclusion that the discharge was discriminatory" and that "the Court's refusal to sustain this finding appears to have been based solely upon its determination that the Company's assigned reason was 'reasonable'." (Pet., Fn. 11, p. 4), Cf. ". . . courts must now assume more responsibility for reasonableness and fairness of Labor Board decisions than

III. REASONS FOR DENYING THE WRIT AS TO QUESTION NO. 2

A. The Court of Appeals' decision that the activity of the Personnel Director of the Company in collecting names of persons who would be interested in attending a meeting of the "Citizens Club" was not illegal interference or interrogation makes it unnecessary to review the Court's subsidiary finding that in engaging in this activity he was not acting as an agent or instrument of the Company.

The Petition asserts the Court of Appeals decision on the matter of Jordan's "agency" conflicts with those of other Courts of Appeals. As this Court said in *S. S. Monrosa v. Carbon Black Export*, 359 U. S. 180, at 184:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the. . . (issue in conflict among the circuits) can await a day when the issue is posed less abstractly."

While the Petition, at pages 15-17, asserts that the Fourth Circuit erred in overturning the Board's finding that Personnel Manager Jordan was the agent of the Employer with respect to his actions in regard to the "Citizen's Committee", the Petition only infer-

---

some courts have shown in the past. . . Congress has imposed upon them the responsibility for assuring that the Board keep within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that the evidence appear substantial when viewed on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals." (NLRB v. Universal Camera Corp., 340 U. S. 474, at p. 490).

entially disputes the basic finding of the Court below that Jordan's activity, whether the employer was responsible or not, did not constitute illegal interrogation or interference in any event.

It makes no difference whether the Personnel Manager was acting as the Employer's "agent" or not unless it is first established that what he did would have violated the Act if he had been the Employer's agent. What is here involved is that the Court below found that substantial evidence did not support the Board's finding that Jordan's actions were unlawful interrogation or interference prohibited by Section 8 (a) (1) of the Act.

In answer to the contention that Jordan, the Personnel Director, initiated the Citizens Club is the finding by the Court:

> "Actually, as was also found by the Board, the initial suggestion respecting the desirability of forming the 'Citizens Club' came from Reverend R. C. Emory, a local minister who was not shown to have any connection with the plant. Reverend Emory, rather than the Company, fostered the idea of such an organization by approaching, separately, both Ivester and Jordan (and, for all the record shows, a number of others) and suggesting to them its formation. In fact, as the record reveals, Reverend Emory approached Ivester on the subject on two separate occasions urging action on the part of Ivester in organizing the group."
>
> *(Pet., pp. 25, 26)*

It must also, we submit, be noted that neither the Trial Examiner nor the Board found that the Citizens Club was supported or assisted by the Company or was its alter ego, as alleged in the Complaint. The only evidence in support of the allegation was that Jordan lent his assistance by the inquiry of some 15 to 25 employees as to whether they would be willing "to meet and discuss the problem and ask any questions that they might have to ask" and noted the names and addresses of those who indicated such willingness. He ultimately turned these names and addresses over to Ivester, a non-supervisory employee. The Court then found that there were "no threats of reprisals or coercion of any kind, nor the aggressive fostering of antiunion activity decried by the Courts . . ." in this conduct of Jordan; and, as a consequence, refused to enforce the Board's finding of illegal interrogation or interference, as a result of Jordan's actions, citing *NLRB v. Brookside Industries*, 308 F. 2d 244, 4 Cir. (Pet., p. 25). The Court then "furthermore" went on to find that there was no evidence in the Record that Jordan, in collecting the names, was acting as an instrument or agent of the management in making the inquiry, making the list, or giving it to Ivester.

We submit that whether the Court below, in its review of the evidence, was correct as to its finding as to the lack of substantial evidence to support the Board's finding as to Jordan's status as a Company agent is not grounds for certiorari:

> "We do not grant a certiorari to review evidence and discuss specific facts."
>
> *United States v. Johnson, supra*

IV CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK A. CONSTANGY
1611 Candler Building
Atlanta, Georgia 30303
Attorney for Respondent

Of Counsel:

CONSTANGY & PROWELL
1611 Candler Building
Atlanta, Georgia 30303